



December 20, 2000

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OR2000-4800

Dear Mr. Farmer:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 142457.

The Granbury Independent School District (the "district"), which you represent, received a request for information relating to two former district employees including employment applications, employment histories, complaints filed against the employees, and any materials compiled during any investigation of complaints against the employees. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.111, 552.114, and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You assert that you are not submitting responsive "education records" pursuant to Open Records Decision No. 634 (1995). The Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. 1232g, provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990).

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. Therefore, to the extent the responsive information qualifies as student identifying information contained in a student's education record, the information is excepted from disclosure under FERPA and section 552.114 of the Government Code, and the district need not request a decision from this office to withhold the information.

We also note that the district, in its brief dated October 13, 2000, submitted arguments and asserted sections 552.101 and 552.131 of the Government Code in support of withholding information related to a sexual harassment investigation. However, the documents submitted to this office as responsive to this request do not include the sexual harassment investigation file, as stated in the district's brief. The documents consist of the personnel files of the two named district employees. Therefore, we assume that the district has released all other requested information to the requestor except for information excepted under FERPA. *See* Gov't Code § 552.301(e)(1)(D) (providing that a governmental body is required to submit to this office a copy of the specific information requested in order to withhold requested information); Gov't Code § 552.302 (providing that requested information is presumed to be public, if the governmental body fails to request a decision in accordance with section 552.301).

You also state the following: "there may also be records contained in the settlement agreement which have been sealed by the court order . . . over which the District no longer possesses control, constructive or actual." We understand you to argue that the district no longer maintains any records contained in the settlement agreement. Section 552.002 of the Government Code defines "public information" as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it. A governmental body is not required to obtain information not in its possession. Open Records Decision No. 558 (1990).

Therefore, if you do not have possession of responsive information, you need not comply with this aspect of the request.

Initially, we note that the submitted information contains documents that are deemed public under section 552.022 of the Government Code. Section 552.022 provides the following:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

. . . .

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body;

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

. . . .

(13) a policy statement or interpretation that has been adopted or issued by an agency;

. . . .

(18) a settlement agreement to which a governmental body is a party.

The submitted information contains salary information, teacher contracts, district policies, and a resignation/settlement agreement which are public information under section 552.022(a) and must be released.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 21.355 of the Education Code provides, "A document evaluating the performance of a teacher or administrator is confidential." This office interprets this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. *See Open Records Decision No. 643 (1996)*. In that decision, this office also concluded that a teacher is

someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* Based on the reasoning set out in Open Records Decision No. 643, we conclude that some of the documents submitted to this office are confidential under section 21.355 of the Education Code. We have marked the documents the district must withhold under section 21.355 of the Education Code.

We also note that the submitted information includes Employment Eligibility Verification Form I-9's. Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that the form "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Release of this document under the Public Information Act would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that Form I-9 is confidential under section 552.101 and may only be released in compliance with the federal laws and regulations governing the employment verification system. We have marked the Form I-9's which you must withhold.

Section 159.002(b) of the Occupations Code protects from disclosure "[a] record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician." The documents you submitted to this office include medical records, access to which is governed by provisions outside the Public Information Act. Medical records may only be released as provided by chapter 159 of the Occupations Code. Open Records Decision No. 598 (1991). The Occupations Code provides for both the confidentiality of medical records and certain statutory access requirements. *Id.* at 2. We have marked the documents that fall within the protection of chapter 159 of the Occupations Code.

Additionally, the submitted personnel files contain information made confidential by section 552.102(b) of the Government Code, which reads:

Information is excepted from [public disclosure] if it is a transcript from an institution of higher education maintained in the personnel file of a professional public school employee, except that this section does not exempt from disclosure the degree obtained or the curriculum on a transcript in the personnel file of the employee.

The submitted transcripts are maintained in the personnel files of professional public school employees. As such, the district must withhold all information on the submitted transcripts, except for the degree obtained and the curriculum. We have marked the information that is not excepted by section 552.102(b) and must be released.

Section 552.117(1) excepts from disclosure information that relates to the home addresses, home telephone numbers, social security numbers, and family member information of current or former employees of a governmental body who request that this information remain confidential under section 552.024. You do not indicate whether or not the subject employees made the election under section 552.024 to prohibit the release of section 552.117 information. Please note that whether a particular piece of information is protected by section 552.117(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a proper election must be made *prior* to the request for information. If the employees did not elect prior to the request to keep their home addresses, telephone numbers, social security numbers, or family member information confidential under section 552.024, this information may not be withheld from public disclosure based on section 552.117(1) of the Government Code. If the employees did make such an election, this information must be withheld. We have marked the types of information that must be withheld under section 552.117 of the Government Code.

We also note that social security numbers are excepted from required public disclosure under section 552.101 of the Government Code in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if the social security numbers were obtained or are maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). It is not apparent to us that the social security numbers contained in the records at issue were obtained or are maintained by the district pursuant to any provision of law enacted on or after October 1, 1990. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the district to obtain or maintain a social security number. Therefore, we have no basis for concluding that the social security numbers at issue were obtained or are maintained pursuant to such a statute and are, therefore, confidential under section 405(c)(2)(C)(viii)(I). We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing the social security number, the district should ensure that these numbers were not obtained or maintained by the district pursuant to any provision of law enacted on or after October 1, 1990.

You also assert section 552.107(1) of the Government Code. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. This section excepts information that an attorney cannot disclose because of a duty to his client. Although you assert section 552.107 in your brief, you have not labeled any of the documents as being excepted under section 552.107. *See* Gov't Code § 552.301(e)(2) (providing that a governmental body must label copy of information to indicate which exceptions apply to which part of the copy). After reviewing the submitted information, we do not find that any of the information may be withheld under section 552.107.

The district also raises section 552.111 of the Government Code, which excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993),

this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions do not encompass internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. Open Records Decision No. 615 at 5-6 (1993); *see also Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (personnel communications not relating to agency's policymaking not excepted from public disclosure pursuant to section 552.111). You have not marked any of the information under section 552.111. *See* Gov't Code § 552.301(e)(2) (providing that a governmental body must label copy of information to indicate which exceptions apply to which part of the copy). After reviewing the submitted information, we conclude that the district may not withhold any of the information under section 552.111.

In summary, the district must withhold the information we have marked, which includes Form I-9's, teacher evaluations, portions of college transcripts, and medical records. Additionally, if proper elections were made under section 552.024, the district must withhold information made confidential under section 552.117(1) of the Government Code. The remaining responsive information in the district's possession must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body

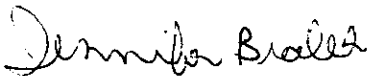
fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jennifer Bialek
Assistant Attorney General
Open Records Division

JHB\er

Ref: ID# 142457

Encl: Marked documents

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